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IN THE

Supreme Court of the United States

October Term, 1938.

No. 287.

THE UNITED STATES OF AMERICA,
Appellant,

v.

THE PENNSYLVANIA RAILROAD COMPANY,
Appellee.

Brief for the Pennsylvania Railroad Company, Appellee.

Appeal From the District Court of the United States for the Eastern District of Pennsylvania.

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Appellant,

v.

THE PENNSYLVANIA RAILROAD COMPANY,

Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF FOR THE PENNSYLVANIA RAILROAD COMPANY, APPELLEE.

I. Opinion Below.

The opinion of the District Court (R. 27, 28) has not yet been reported.

II. Jurisdiction.

Appellee in its Statement Opposing Jurisdiction and Motion to Dismiss or Affirm and the Memorandum in support thereof, both of which have been filed in this proceeding, has stated its reasons why this Court has no jurisdiction to entertain this *direct* appeal. In its order of October 10, 1938, this Court noted probable jurisdiction and postponed further consideration of the motion to dismiss the appeal until the hearing on the merits.[1] Appellee renews

[1] The order is: "In this case probable jurisdiction is noted. Further consideration of the motion to dismiss or affirm is postponed to the hearing of the case on the merits."

its motion to dismiss the appeal and incorporates herein by reference the argument it has previously made in its Memorandum.

III. Question Presented.

The sole question presented on this appeal is whether or not the averments in the indictment that the shipments were transported through the Eastern District of Pennsylvania allege a crime there committed, when the indictment discloses that such transportation was at a lawful rate, but does not allege that the rebates were given in such district. *Constitution, Article 3, Section 2, Clause 3; Amendment VI.*

IV. Statute Involved.

The statute involved is Section 1 of the Elkins Act, as amended,[2] the relevant provisions of which are printed in the Appendix to the Government's brief at pages 32-33.

V. Concise Statement of the Case.

Defendant in the present case was indicted in the United States District Court for the Eastern District of Pennsylvania for offering, granting and giving rebates and concessions in respect to the transportation of property in interstate commerce, in violation of the Elkins Act. The indictment (R. 2-23), which was found on March 6, 1937, contains twenty-six counts, each count referring to a particular freight car. In each it is alleged that during October, 1932, the defendant and its connecting carriers transported a shipment of grapes for the Midstate Horticultural Co-

[2] Act of February 19, 1903, c. 708, § 1; 32 Stat. 847, as amended by the Act of June 29, 1906, c. 3591, § 2; 34 Stat. 587; U. S. C., Title 49, § 41 (1).

pany, Inc. as consignor, from California to Manhattan Produce Yards in New Jersey. Each count contains an averment of the weight of the shipment, the number of the car in which it was transported, the date of delivery and to whom delivered, and the payment by the Midstate Company to defendant of the transportation charges provided for in the applicable tariffs. In each count there appears an allegation identical with the following (R. 3), except as to the point of origin of the shipment and the amount of the alleged rebate:

> "That thereafter on, to wit, May 15, 1935, said defendant, The Pennsylvania Railroad Company, unlawfully did knowingly offer, grant and give, and cause to be offered, granted, and given, to said Midstate, a rebate and concession in the amount of, to wit, $282.24, in respect to the aforesaid transportation of said shipment of property by said common carriers, whereby said property was transported from said Quality, through the Eastern District of Pennsylvania and within the jurisdiction of this Court, to Manhattan Produce Yards aforesaid at a less rate and charge than that named and provided in the schedules and tariffs . . ."

On May 27, 1937, defendant filed a Motion for a Bill of Particulars (R. 23) asking that it be informed whether the alleged rebates were paid in connection with a loss and damage claim by the Midstate Company, and where and how the alleged rebates were paid. After hearing argument, the Court granted the Motion (R. 24).

The Government, on March 21, 1938, filed its Bill of Particulars (R. 25), in which was set forth, in answer to the question "Where was the crime committed?" the following:

"1. Answer. It is assumed that defendant desires to know where the check by which payment of all rebates alleged in the twenty-six counts of the indictment was handed by a representative of the Pennsylvania Railroad to a representative of the Midstate Horticultural Company, Inc., and therefore states that the check in payment of all the rebates alleged in the said twenty-six counts of the indictment was given by a representative of the said Railroad Company to A. Setrakian, Vice-President, Secretary and General Manager of the Midstate Horticultural Company in the City of New York, State of New York . . ."

The Bill also stated that the Government contended that defendant paid the loss and damage claims without carrier liability for the alleged loss and damage, from which it is clear that the so-called rebates were paid in settlement of loss and damage claims by the Midstate Company.

On April 9, 1938, defendant filed its demurrer (R. 26) to the indictment. The demurrer was based on lack of jurisdiction in the District Court in that it was not averred in the indictment that the alleged rebates were given within the jurisdiction of the District Court or where the alleged rebates were given. After argument, the Court in an opinion (R. 27) filed June 16, 1938, sustained the demurrer, and on July 2, 1938, a formal order (R. 28) was filed. This appeal (R. 29) followed on July 20, 1938.

VI. Summary of Argument.

An indictment which fails to allege the place of the commission of the offense is demurrable. It is not alleged where the rebates were given. Unless the averments in this indictment, that the several shipments were transported through the Eastern District of Pennsylvania describe a crime there committed, the demurrer should be sustained. A proper construction of the Elkins Act requires that a distinction be drawn between the situation where the transportation *continues* the offense of granting a rebate, and the situation in the present case wherein no rebate was given prior to the transportation and the transportation when conducted through the Eastern District of Pennsylvania was lawful. In the latter situation no crime was in existence when the transportation was conducted and hence no crime could be continued by such transportation. The Act does not purport to confer jurisdiction on a district court in whose district no crime was committed. If, as the Government contends, the Act should be so construed, it violates the Sixth Amendment of the Constitution. The offense defined by the Act is the granting of a rebate. This offense was not committed in the Eastern District of Pennsylvania either by the actual giving of a rebate therein or by unlawful transportation through that district after the rebate was granted. The District Court for the Eastern District of Pennsylvania accordingly has no jurisdiction to try the alleged offense.

VII. Argument.

1. The Demurrer to the Indictment Should be Sustained Because the Indictment Does Not Allege That a Crime Was Committed Within the Eastern District of Pennsylvania.

A. An indictment must allege where the crime was committed.

The indictment does not aver where the alleged rebates were given. Moreover, as appears from the Bill of Particulars, the alleged rebates were given in New York City, and not within the jurisdiction of the District Court. A failure to aver where the crime was committed clearly renders the indictment demurrable.[3] The reason for the requirement that the place of the crime must be alleged is found in the Sixth Amendment of the Constitution which gives to the accused in all criminal prosecutions the right to trial "by an impartial jury of the State and district wherein the crime shall have been committed."[4] An attempt by Congress to confer jurisdiction on a district wherein a lawful act was committed, the crime being elsewhere committed, would be unconstitutional. That the Elkins Act, as we construe it, does not violate the Sixth Amendment will be developed in a later portion of this brief.

Unless, therefore, the averment that the several shipments were transported through the Eastern District of

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[3] *U. S. v. Marx,* 122 Fed. 964; *Patterson v. U. S.* (C. C. A. 6th), 222 Fed. 599, 626, certiorari denied, 238 U. S. 635; *U. S. v. Cristopherson,* 261 Fed. 225.

[4] *Bratton v. U. S.,* 73 F. (2d) 795, 798 (C. C. A. 10th): "When it is recalled that the Sixth Amendment gives the accused a right to a trial in the 'district wherein the crime shall have been committed', a failure to allege that the crime was committed in the district is inexcusable."

Pennsylvania describes a crime there committed, the order of the District Court should be affirmed.

B. The averments in the indictment that the several shipments were transported through the Eastern District of Pennsylvania do not, under the facts and circumstances alleged, describe the commission therein of a violation of the Elkins Act.

It is essential to a consideration of this case that there be clearly borne in mind the distinction between the situation where there is a payment of a rebate *before* the transportation occurs, and the situation in the present case where the transportation was lawfully conducted and some two and a half years *after* its completion an alleged rebate was paid. In the first situation, the offense, namely, the granting of the rebate, is continued by transportation in any jurisdiction through which the transportation is conducted *after* the rebate is granted. There actual transportation is an essential element. In the second situation as in the present case, however, no crime is in existence when the transportation is conducted and hence there can be no continuance of it by the transportation. In that case, actual transportation is not an essential element.[5] Since the trans-

[5] *Armour Packing Co. v. U. S.*, 209 U. S. 56, 74:

"Congress also embraced in § 1 of the Elkins Act offenses not depending upon actual transportation through districts; and as to the trial of such, it also made provisions in the venue section.

"For the penal section is not only aimed at offenses whereby property is transported in interstate commerce at less than published rates, but in terms covers the offering, granting, giving, soliciting, accepting or receiving of rebates, concessions or discriminations, 'whereby any other advantage is given or discrimination is practiced' in respect of interstate transportation.

portation through the Eastern District of Pennsylvania in the present case was lawful when conducted, it cannot be said that a crime was there committed, because of the Sixth Amendment.

The Elkins Act should be construed so as to distinguish between these two dissimilar situations. Such a construction gives effect to every word in the venue clause of the Act. If—and we contend that this has already been decided by this Court—the offense is the granting of a rebate, then it should be prosecuted where it is committed. But Congress had in mind also that the offense once committed could be continued during actual transportation, and to cover such a situation conferred jurisdiction on any district through which the unlawful transportation was conducted. In such a case the granting of a rebate, in effect, taints the transportation with the result that wherever actual transportation is thereafter conducted, the offense of granting a rebate is continuously committed.

This construction of the Act was adopted by this Court, in holding that an indictment will lie in a jurisdiction through which a shipment was transported *under an illegal rate* when the agreement to transport at such rate was consummated in another jurisdiction before the shipment moved. *Armour Packing Co. v. U. S.*, 209 U. S. 56. In that case the Railroad had filed a tariff with an applicable rate of 23 cents per 100 pounds. Thereafter it agreed with the

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"Congress doubtless had in mind that some of these offenses might be complete in a single district; some might be begun in one and completed in another; and those wherein transportation—actual carriage—was made an essential element might continue through several districts, and hence undertook to provide places for trial of any offense which might be committed against the provisions of the act."

Packing Company to transport all its shipments during a stated period for the tariff rate. Before the expiration of the period, the Railroad filed a new tariff providing for a rate of 35 cents per 100 pounds. After this change in the rate the Packing Company delivered a shipment to the Railroad at Kansas City, Kansas, and paid the Railroad 23 cents per 100 pounds in accordance with the agreement. The shipment was transported at the illegal rate through the Western District of Missouri, and the Packing Company was there indicted for violating the Elkins Act.

The Packing Company contended that there was no jurisdiction to prosecute in the Western District of Missouri because the alleged offense was not there committed, but was complete in Kansas City, Kansas, and that if the Elkins Act were construed to permit a prosecution in Missouri, it was unconstitutional under the Sixth Amendment. The Court rejected these contentions (three justices dissenting), affirmed the ruling of the District Court, and upheld its jurisdiction. It ruled that the offense of receiving a rebate in Kansas was continued in each district through which the transportation was received "*at the prohibited rate*" (p. 77 —italics supplied). In the dissenting opinion of Mr. Justice Brewer, joined in by Chief Justice Fuller and Mr. Justice Peckham, the jurisdiction of the Missouri District Court was denied on the ground that the jurisdictional clause of the Elkins Act was unconstitutional because the crime was complete in Kansas and could not be made a continuing offense in each district through which the goods were transported.[6]

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[6] 209 U. S. 56, 89:

"I am authorized to say that the Chief Justice and Mr. Justice Peckham concur in this dissent. They are also of the opinion that the trial court, the District Court of the

A careful study of the majority opinion will show tha the Court based its conclusions squarely on the fact that th Act was intended to make an *illegal* movement the basis o jurisdiction. Thus the Court pointed out (page 73) that i was specifically made an offense in the Act "to receive an rebate or concession *whereby any such property is by an device whatever transported* at a less rate than tha named." (The italics are the Court's.) In other words, th Court emphasized the illegal transportation. Again, pag 74: "For the penal section is not only aimed at offense whereby property is transported in interstate commerce a *less than published rates . . .*" (italics ours). "It is a least certain that these sections, construed together, mak *an offense of obtaining transportation at a concession fro the published rate, which shall be triable in any distri through which it is had.*" (Italics ours.) And on page 7 the Court said: "Under the amended Act, transportation *with a rebate, or at a concession from the established rate* is made an offense as to the shipper as well as the carrier. (Italics ours.) On page 76, the Court pointed out that "dis

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Western District of Missouri, had no jurisdiction of the a leged offense, but that such jurisdiction was vested in th District Court of Kansas, holding that when goods are de livered to the carrier, and the shipper has solicited, accepte or received any rebate, concession or discrimination fro such carrier, 'in respect to the transportation' of the good the crime is then complete, at least so far as regards th shipper, and it cannot be made a continuing crime in eac district through which the goods pass in their transporta tion. The Constitution has made provision for the venu of criminal actions or prosecutions, and their nature cannot be altered by legislative enactment, so as to embrace th whole country in one vast district. A provision in a statut of this nature by which it is possible to find an indictmen and to have a trial at the most remote point from the actua commission of the offense, ought not to be approved as i compliance with the Constitution."

ing transportation the crime is being constantly committed." (Italics ours.) These statements are to be read in the light of the actual decision of the Court.

It is important to note that in the *Armour* case the shipment was actually transported through the Western District of Missouri at an unlawful rate. The Court did not decide that transportation at a *lawful* rate could be made the basis of jurisdiction in a district through which the lawful transportation was conducted.

Judge Sanborn in the Circuit Court of Appeals based his conclusion on the illegal transportation.[7]

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[7] 153 Fed. 1, 5, 6, 9 (C. C. A. 8th):

"The general principle that one who commits a *criminal* act in one county, state, or district may be held liable for its continuous operation in another to which its effect extends, is established by these and many other authorities. . . .

"A continuing offense is a *continuous, unlawful* act or series of acts set on foot by a single impulse and operated by an unintermittent force, however long a time it may occupy. Where such an act or series of acts runs through several jurisdictions, the offense is committed and cognizable in each. . . . The transportation of the goods in this case into and through the Western district of Missouri, at the illegal through rate, was the continuing operation and effect in that district of its primary cause, the receipt of the concession and the delivery of the oil by the shipper to the carrier thereunder for transportation in foreign commerce, and even if the shipper's offense was complete in Kansas, it may have been committed in Missouri also, where its operation continued and took effect. . . .

"Every part of the transportation thus caused is unavoidably violative of this act and illegal, and is necessarily the continuing operation and effect of the unlawful receipt of the concession whereby the carriage is induced. . . . *The transportation of the property in the case in hand from Kansas City to New York into and through the Western district of Missouri at a through rate less than that established under the law was the continuing operation and effect of the receiving of the concession and the delivery of the property thereunder by the shipper.*" (Italics supplied.)

In the present case it appears from the indictment that the shipments moved in October, 1932, and were delivered at the Manhattan Produce Yards in New Jersey in December, 1932. It is not alleged that at those times the shipments were moving under an unlawful rate. On the contrary, the indictment avers that defendant collected from the Midstate Company the "transportation freight charges" provided for in the applicable tariffs, and alleges the giving of rebates "thereafter, on, to wit, May 15, 1935", some two and a half years after the completion of the transportation.[8]

In a later case this Court held (four justices dissenting) that conspirators could be prosecuted in a district in which an overt act was committed though the conspiracy was formed in another jurisdiction. *Hyde v. U. S.*, 225 U. S. 347. The Court referred to the decision in the *Armour* case that "the transportation of merchandise for less than the published rate is, under the Elkins Act, a continuing offense" (p. 364), and concluded that the conspiracy was continued where the overt act was committed. *It will be observed that the Court is again stressing the continuing nature of an offense already committed.* Mr. Justice Holmes, with whom concurred Mr. Justice Hughes, Mr. Justice Lurton and Mr. Justice Lamar, dissented on the ground that the lower court had no jurisdiction, saying, p. 388:

> "The overt act is simply evidence that the conspiracy has passed beyond words and is on foot when the act is done. As a test of actuality it is made a condition to punishment, but it is no more a part of the crime than it was at common law, where it was customary to allege such an act; or than is the fact that the statute of limitations has not run.
>
> "I can think of no other case in which it would be argued that an act constituting no part of the crime

[8] Pages 4, 9 of the Government's brief.

charged draws jurisdiction to the place where it is done."

In *New York Central Railroad Co. v. U. S.*, 166 Fed. 267 (C. C. A. 2d), the carrier was indicted in the Western District of New York for wilfully failing to file schedules of rates with the Interstate Commerce Commission. The court decided that the offense was committed in Washington, D. C., and that it was not a continuous offense running into different districts. In discussing the fact that the schedule was prepared in New York, the court said at page 270:

> "The preparation of the schedule is an entirely lawful act, and wholly distinct from the duty or omission of duty to file it. The work of preparation is ended before the duty to file begins. The case is not at all analogous to the offense of presenting a false claim in one district which was prepared in another. There the unlawful preparation might well be considered an essential part of the unlawful presentation, and the commission of the offense as having been commenced where the preparation took place. *The distinction is between a continuous unlawful act and an unlawful act following a completed lawful act.*" (Italics supplied.)

Another case which illustrates that an offense cannot be continued until after the commission of a criminal act is *Conley v. U. S.*, 23 F. (2d) 226 (C. C. A. 4th). There the defendant was indicted in North Carolina for violating § 151 of the Penal Code (U. S. C., Title 18, § 265) which made it an offense to conceal with intent to defraud any forged or altered obligation of the United States. The defendant had stolen unaltered Liberty Bonds in North Carolina and at the time of his apprehension in Michigan the bonds were altered. Defendant appealed from the conviction, assigning as error, *inter alia*, that the District Court had refused to

charge the jury that if not satisfied that defendant did not have the bonds in North Carolina after they had been altered or that he altered them in North Carolina, they should find him not guilty. The Government contended that the venue was properly laid in North Carolina under the Statute (U. S. C., Title 28, § 103), which provided that where an offense is begun in one district and completed in another it may be dealt with in either. In reversing, the Court said (p. 228):

> "And while the intention may have been formed at that time to afterward make the alteration, yet we are of the opinion that, even if such an intention could be properly concluded from the evidence in the case, it did not constitute such a beginning as is contemplated by section 1024, Comp. Stat. Ann. . . .
>
> "The offense of having in possession the bonds in question with intent to defraud, might consist of distinct parts having different localities, and might constitute a continuously moving act, yet it is clear that this offense could not have begun until after the bonds had been altered."

It is submitted that the transportation through the Eastern District of Pennsylvania almost two and a half years before the payment of the alleged rebates will no more support the jurisdiction of the District Court in the present case than the offense of possessing bonds in North Carolina with intent to defraud before they had been altered could furnish a basis for the jurisdiction of the North Carolina District Court in the *Conley* case. The similarity between the *Conley* case and the present one is emphasized by comparing both cases with the one which is referred to in the Government's brief.[9]

[9] Pages 28-29 of the Government's brief.

A consideration of the first portion of the venue clause of the Elkins Act which confers jurisdiction where the violation of the Act is committed requires a discussion of the nature of the offense prescribed in the statute. The Government contends that the offense consists primarily of the accomplishment of a forbidden result, namely, the obtaining of transportation in the Eastern District of Pennsylvania at less than tariff rate.[10] From this it argues that the place of the commission of the offense in the constitutional sense is the Eastern District of Pennsylvania. It is interesting to note the conclusion to which this argument leads. If the offense, by definition in the charging part of the act, is committed wherever the forbidden result is accomplished, then Congress could have provided for all contingencies in the venue section by conferring jurisdiction on the court in whose district the violation of the act was committed. It would have been wholly unnecessary to refer to the districts through which the transportation may have been conducted. This construction, however, does not give effect to every clause, sentence and word of the act.[11]

An analysis of the Government's interpretation of the Act reveals a fatal error in logic. The conclusion is inserted as part of the premise. The reasoning is somewhat as follows: the offense consists primarily of the accomplishment of a forbidden result—the obtaining of transportation in the Eastern District of Pennsylvania at less than tariff rate; since this result was produced in the Eastern District of Pennsylvania, that is the district wherein the offense was committed. This reasoning, however, assumes that the forbidden result was accomplished before the cause, the grant-

[10] Page 11 of the Government's brief.
[11] Page 17 of the Government's brief.

ing of the rebate, occurred. It cannot be said that the transportation through the Eastern District of Pennsylvania was the result of the granting of a rebate almost two and a half years after the transportation was concluded. Although the Government does not categorically assert that the granting of a rebate relates back to the lawful transportation so as to make it unlawful and thereby make it a crime at the time it was conducted, it reaches the same conclusion by its reasoning. We contend that this result was never intended by Congress, and that this Court in the *Armour* case has already construed the Act so as to preclude such a result. A statement that the offense of granting a rebate may be continued by subsequent transportation, it is submitted, excludes the proposition that such offense can relate back to lawful transportation conducted prior to the granting of the rebate.

The Government characterizes the Act as one designed to prevent the accomplishment of a specified result, rather than the conscious act of the wrong-doer. It is said that the law forbids the achievement of the consequence itself.[12] It may be inquired, the consequence of what. There must be some conscious act prescribed by a statute before any consequence can be said to flow from it. The only conscious act prescribed in this statute is the granting of a rebate. Until this act is committed, no consequences can result from it. It is not helpful to say that as a consequence of the rebate, transportation was furnished at less than the tariff rate. In this sense, transportation is an essential element of the alleged offense. But the relevant inquiry is, was the transportation unlawful when conducted so that at that time a crime was committed in the Eastern District of Pennsylvania.

[12] Page 13 of the Government's brief.

This question cannot be affirmatively answered unless the act of granting a rebate can be "continued backward" to the lawful transportation and unless it is concluded that a precedent occurrence can be the consequence of a subsequent act. Such a conclusion is contrary to reason and to the plain provisions of the statute.

The Government attempts to support its construction of the Elkins Act by coupling the Act with the opinion in *Davis et al. v. U. S.*, 104 Fed. 136 (C. C. A. 6th).[13] A careful analysis of the *Davis* case discloses that the Court concluded that transportation was not an essential element in the offense prescribed by Section 10 of the Interstate Commerce Act,[14] because no jurisdiction was conferred on any district court other than the one in which the violation was committed. If Congress had intended transportation to constitute a part of the crime, the court apparently reasoned, it would have provided for the prosecution of the offense in districts through which the transportation was conducted. It will be noted, however, that the Court stated that Congress could have made the offense a *continuing* one by making certain additional provisions in the Act.[15] This, it is submitted, is precisely what Congress intended to and did do by adding in the Elkins Act that prosecutions should be instituted in any district through which the transportation may have been conducted. It is not unreasonable to believe that the drafters of the Elkins Act had in mind the *entire* opinion in the *Davis* case, including the portion above

[13] Pages 18-19 of the Government's brief.

[14] Act of February 4, 1887, c. 104, Section 10 (3), 24 Stat. 382, as amended, U. S. C., Title 49, Section 10 (3).

[15] 104 Fed. 136, 141: "If the carriage of the goods was the thing aimed at in this statute, and such was to have been deemed fraudulent per se, the crime might be regarded as a continuing one." (Italics supplied.)

quoted.[16] That this is also what this Court believed Congress had done is forcefully shown in the *Armour* case, in which the opinion was written by Mr. Justice Day, who as Circuit Judge wrote the opinion in the *Davis* case.

It is instructive to analyze the analogy the Government draws between the Elkins Act and homicide statutes.[17] Let us suppose that A standing in X shoots a gun and the bullet kills B standing in Y. The offense of killing B was cognizable at common law only in Y. By statute the offense may be made punishable in X or Y. The theory on which is rested the power of X to punish the offender is that the act of shooting the gun *caused* a criminal result in Y.[18] It therefore appears that two elements must exist in order to permit a prosecution in X: (1) the act of shooting must by statute be made punishable in X, and (2) must have *caused* a crime. We contend that the act of lawful transportation is not made punishable anywhere by the Elkins Act. If the Act purported to make the lawful transportation a crime, the requirement that the lawful act must cause the criminal result would be disregarded. That such an attempt by Congress would be unconstitutional is indicated by the Circuit Court of Appeals in the *Armour* case.[19]

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[16] Page 18 of the Government's brief.

[17] Page 13 of the Government's brief.

[18] American Law Institute Restatement, Conflict of Laws, § 428.

[19] 153 Fed. 1, 19:

"The last clause of the portion of the act quoted above, which, in addition to the court in whose district the violation of the act is committed, confers jurisdiction upon every other court of the United States, which has criminal jurisdiction, through whose district the transportation is conducted, is unconstitutional and void if the offense is not a continuing crime, but valid and effective if it is, and that

In addition to conferring jurisdiction on districts herein the Act is violated and through which *unlawful* transportation is conducted, Congress has, in the Elkins Act, provided also that where the offense, namely, the granting of a rebate, is begun in one jurisdiction and completed in another, it may be prosecuted in either jurisdiction. This last provision, it is submitted, conclusively dissipates the difficulties, suggested by the Government, in ascertaining the place of payment of a rebate.[20] If any part of the offense of granting a rebate—and this would include the delivery of a check—occurred in a district, the offense could under this provision, be prosecuted in that district.

In this connection the Government has rhetorically inquired where jurisdiction would lie where a carrier made a proper transportation charge on its books but wilfully failed to collect it.[21] The obvious answer is that the rebate was granted and the offense committed at the place where the carrier failed to collect the charge. This would normally be the place of final delivery of the shipment,[22] but the offense might be committed in other places depending on the circumstances of the particular case.

The possibility is suggested by the Government [23] that payment of a rebate might be made beyond the jurisdiction of the United States and the Act thereby evaded. It must be remembered, although it is not applicable in this case

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onstruction which validates and sustains must be preferred to that which strikes down and paralyzes so plain a provision of a statute."

[20] Pages 21-23 of the Government's brief.

[21] Page 24 of the Government's brief.

[22] See *Hocking Valley R. Co. v. U. S.*, 210 Fed. 735 (C. A. 6th), certiorari denied 234 U. S. 757, where a similar situation was apparently involved.

[23] Page 23 of the Government's brief.

because it is alleged that rebates were actually given, that the Act forbids the offering or solicitation of a rebate as well as the giving or receiving of it. As a practical matter it would be virtually impossible for two or more persons to be simultaneously at the same place outside their country for the purpose of giving and receiving a rebate either without prior conduct in this country which would amount to offering or soliciting a rebate, or subsequent transportation in this country which would be tainted by the illegal agreement or payment made outside the country. It may be noted also that Section 10(2) of the Interstate Commerce Act [24] makes it unlawful for a carrier, by false billing or other methods therein set forth, to assist any person to obtain transportation at less than tariff rate.

The obstacles which the Government states would present an effective enforcement of the Act are, therefore, illusory. If any obstacles in fact exist, the scope of the Act cannot be correspondingly enlarged because of their existence. This is a penal statute and should be strictly construed. There is no basis for the loose construction which the Government seeks to place upon it.

C. The offense prescribed in the Elkins Act is primarily the granting of a rebate.

That the offense defined in the statute is primarily the granting of a rebate is illustrated by two decisions of this Court. In *New York Central R. R. Co. v. U. S.*, 212 U. S. 481, the carrier was indicted on six counts for *giving a rebate* under an agreement with the shipper, which provided for payment of the full legal rate, the subsequent presentation of a claim by the shipper and a rebate of a certain sum

[24] *Supra*, note 14.

the carrier to the shipper on account of the claim. Upon viction on all six counts, each of which alleged a separate ment of a rebate, an appeal was taken to this Court on theory that because of the agreement prior to the transtation the offense was single and continuing and a conion for six separate offenses could not be sustained. In olding the conviction on all six counts, this Court said at e 498:

"The statute makes it an offense to give or receive a rebate whereby goods are transported in interstate commerce at less than the published rate; in the present case the jury found the railroad company guilty of rebating as charged. We are not dealing with a case where there was an agreement to carry the goods in the first place at a concession from the established rate, and wherein the railroad company never received the full legal rate. In this case, upon each of the numerous shipments, the full legal rate was paid, and upon claims being presented at short intervals the amount of the stipulated rebate was remitted by check to the shipper. We think the offense was complete when the railroad company thus paid the stipulated rebate to the shipper."

In *New York Central Railroad Company v. U. S.* (No. 12 U. S. 500, the facts were similar to those in the first and a conviction for violation of the Elkins Act was ained where the transportation occurred prior to the age of the Act and the rebates were given after its tment. The Court said at pages 504 and 505:

"It is the contention of the plaintiff in error that the language of this statute addresses itself to the future, and it asks the application of the well-known rule that statutes are presumed to be prospective in their operation, and contends that this act has no reference

to property transported in interstate commerce at
than the published rates at any time before the act
into effect.

. . . . . .

"Manifestly the act does not refer alone to
transportation of the property, although that is an
sential element of the offense, but the thing aimed
the giving or receiving of a rebate whereby the
erty shall be transported at less than the rates
the published tariffs. It is the transaction of giving
receiving the rebate, etc., with the effect that the
of the shipper thus preferred shall be transported
reduction from the published rates, which is penalized

In both of the above cases the prosecutions were
tuted in the Southern District of New York where the
bates were alleged to have been paid, so that there was
consideration by the Court of the jurisdictional provision
the Elkins Act. These cases establish that under the
Act no crime is committed until a rebate is given, and
transportation alone is not an offense unless the
tation is under illegal rates.[25]

A further illustration that the offense charged is
marily the granting of a rebate is found in the fact

[25] In *Standard Oil Co. of Indiana v. United States*,
Fed. 376, certiorari denied, 212 U. S. 579, the Circuit
of Appeals for the Seventh Circuit held that the
offenses under the Act is to be determined by the
of payments, saying at p.385:

"The gist of the offense is the acceptance of the
cession, irrespective of whether the property involved
car loads, train loads, or pounds . . .. Take the rebate
commonest form of the evil—the concession being
variety. In the rebate, the shipper pays in the first
the full rate to the carrier and afterwards receives
part. Manifestly the offense of accepting a rebate
been committed until the shipper has taken back a
the freight money, whereby his property has been
ported at less than the lawful rate."

rosecution was instituted in the present case until almost ve years after the transportation had been concluded. The ransportation occurred in 1932, the alleged rebates were aid on May 15, 1935, and the indictment was not found until larch 6, 1937. If the transportation is such an essential art of the crime as is contended by the Government, it is ifficult to understand why the prosecution is not barred by e three-year statute of limitations.[26]

D. Conclusion.

The only act alleged to have been committed in the astern District of Pennsylvania was the transportation of e various shipments through that district. The Governent concedes that this transportation was lawful at the me that it was conducted. The only instance in which ansportation alone may draw jurisdiction to a district rough which it is conducted is, as was held in the *Armour* se, where it follows the offense of granting a rebate. In ch a case the transportation continues the unlawful act granting a rebate. In the present case, however, the fense of granting a rebate was committed in New York ty almost two and a half years after the transportation as concluded. Manifestly this offense could not be conued by the transportation.

It was stated by Judge Sanborn in the Circuit Court Appeals that the portion of the Act which confers juristion on districts through which transportation may be nducted is unconstitutional and void if the offense is not continuing crime.[27] We contend that this portion of the

[26] Act of April 13, 1876, c. 56, 19 Stat. 32, as amended, S. C., Title 18, § 582.

[27] *Armour Packing Co. v. United States*, 153 Fed. 1, 9. e note 19, *supra*, page 18.

Act is constitutional because it does not purport to confer jurisdiction on the District Court in the present case. In order to sustain the Government's contention, however, the jurisdictional portion of the Act must be construed to have conferred jurisdiction on a court in whose district no crime was committed and hence to contravene the Sixth Amendment.

For the foregoing reasons, appellee urges that:

1. The Elkins Act cannot be construed to confer jurisdiction on the United States District Court for the Eastern District of Pennsylvania; and

2. If the Act is construed to confer jurisdiction, it is unconstitutional under the provisions of the Sixth Amendment.

Appellee therefore requests this Court to affirm the action of the District Court in sustaining the demurrer to the indictment.

Respectfully submitted,

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Of Counsel.

SUPREME COURT OF THE UNITED STATES.

Nos. 286, 287.—October Term, 1938.

The United States of America, Appellant, vs. Midstate Horticultural Company, Inc., and Arpazat Setrakian.	Appeals from the District Court of the United States for the Eastern District of Pennsylvania.
The United States of America, Appellant, vs. The Pennsylvania Railroad Company.	

[January 30, 1939.]

Mr. Justice Black delivered the opinion of the Court.

These two appeals present for review a single question. As stated by appellant the sole question in each appeal is "whether or not the indictment charges the commission of an offense against the United States in the Eastern District of Pennsylvania, as it must, if appellees are to be prosecuted therein. *Constitution, Article 3, Section 2, Clause 3; Amendment VI.*"[1]

The defendant in No. 287 was indicted in the Eastern District of Pennsylvania charged with making unlawful rebates on interstate shipments. Defendants in No. 286 were charged, by indictment in the same District, with receiving the unlawful rebates. The District Court sustained demurrers to both indictments. The government appealed directly to this Court. Appellees moved here to dis-

[1] Article 3, Section 2, Cause 3 of the Constitution provides: "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crime shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed." Amendment 6 of the Constitution so far as pertinent provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public Trial by an impartial Jury of the State and District wherein the Crime shall have been committed, which District shall have been previously ascertained by Law, . . ."

miss the appeals on identical grounds. The motions to dismiss [illegible] denied in both cases.[2]

The record requires that we treat the indictments to which [illegible] murrers were sustained as charging that rebates or concessions [illegible] paid and received in New York in 1935 in connection with [illegible] transportation of goods in 1932 from California through the Eastern District of Pennsylvania to New Jersey; that the full lawful rate in accordance with published tariffs was paid when the transportation took place; and that prior to the time of the payment and receipt of the alleged rebates in New York in 1935 the carrier and shippers had neither agreed nor intended that any rebate or concession should be made. The government concedes that the jurisdictional provisions of the Elkins Act,[3] on which the prosecutions are based, require trial in the District in which a violation of the Act is committed, but contends that the record discloses violations actually committed in the Eastern District of Pennsylvania. This contention rests upon the argument that the Elkins Act aims primarily to prevent the result of obtaining transportation at less than the lawful rate; that payment and receipt of rebates in 1935 served to accomplish such forbidden results—namely, transportation in 1932 at less than the lawful rate; and, since the transportation in 1932 passed through the Eastern District of Pennsylvania, the offenses were committed and are punishable there.

The statute defines offenses under it as follows: " . . . it shall be unlawful for any person, persons, or corporation to offer, grant or give, or to solicit, accept, or receive any rebate, concession, or [illegible]

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2 The first ground of the motions to dismiss is that appeal was not taken "within thirty days after the decision or judgment" as required by 18 U. S. C. Section 682. The court below wrote an opinion in which it stated "the demurrers are sustained," and filed the opinion June 16, 1938. But in accordance with the court's practice, final order was not entered until July 2, 1938. In that order the court sustained the demurrers and ordered defendants discharged. The government petitioned for appeal July 20, 1938, within eighteen days after the final order was entered, but more than thirty days after the written opinion had been filed. The appeals were from the judgments and orders of July 2, and not the previous written opinion. The second ground of the motions to dismiss is that the government did not have a right of direct appeal to this Court granted by 18 U. S. C., Section 682, which authorizes such an appeal where judgment sustaining a demurrer "is based upon the invalidity or construction of the statute upon which the indictment is founded." The statute under which the indictments were returned provides expressly for the jurisdiction of offenses created by it, and the record clearly discloses that the rulings on demurrers involved a construction of the statute.

3 49 U. S. C., Sec. 41(1), 34 Stat. 587.

rumination in respect to the transportation of any property in interstate . . . commerce by any common carrier . . . whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, ..." As to venue the statute provides: "Every violation of this section shall be prosecuted in any court of the United States having jurisdiction of crimes within the district in which such violation was committed, or through which the transportation may have been conducted; and whenever the offense is begun in one jurisdiction and completed in another it may be dealt with, inquired of, tried, determined, and punished in either jurisdiction in the same manner as if the offense had been actually and wholly committed therein."

We need not determine whether Congress intended—by providing for the trial of crimes "within the district . . . through which the transportation may have been conducted"—to confer jurisdiction in any District wherein a violation was not committed. The Government only insists that the indictments here disclose offenses committed in the Eastern District of Pennsylvania, and urges that the provision for trial in any District through which illegal transportation is conducted is without meaning unless applicable to these prosecutions.

But there are many offenses in the Act of which this provision is a part to which the provision is clearly applicable. An illustration is that provided in the case of *Armour Packing Co.* v. *United States*, 209 U. S. 56. There an unlawful concession was given in the State of Kansas before interstate shipment was made. Transportation passed through the State of Missouri. The recipient of the concession was tried in Missouri. It was decided that the transaction constituted a continuing offense beginning in Kansas, and that the defendant could be tried in any District through which the unlawful transportation took place. The Court said (at p. 76): "We think the doctrine [of continuing offenses] . . . applies in the present case, for transportation is an essential element of the offense, and, as we have said, transportation equally takes place over any and all of the traveled routes, *and during transportation the crime is being constantly committed.*" (Italics supplied.) The Section of the Elkins Act under which the present indictments were drawn describes other offenses and, in addition, makes it a misdemeanor for a carrier to violate any of the numerous criminal pro-

visions of the Interstate Commerce Act. Congress evidently intended to make it clear that as to any of the many offenses in which "during transportation the crime is being constantly committed" prosecution could be had in any District through which the unlawful transportation moves.

We do not believe Congress intended that subsequent conduct or events should stamp criminality upon an act that was lawful and wholly unrelated to any unlawful plan or purpose, when done. Here, the full lawful rate was paid for the transportation involved. The lawful transportation through the Eastern District of Pennsylvania was not infected by relation to any unlawful agreement, purpose or intent at the time it occurred. The record shows no offense that began in 1932 and continued until 1935. As was clearly set forth by the Circuit Court of Appeals in the *Armour Packing Co.* case:[4] "A continuing offense is a continuous, unlawful act or series of acts set on foot by a single impulse and operated by an unintermittent force, however long a time it may occupy. Where such an act or series of acts runs through several jurisdictions, the offense is committed and cognizable in each. . . . The transportation of the goods in this case into and through the Western district of Missouri, at the *illegal through rate*, was the continuing operation and effect in that district of its primary cause, the receipt of the concession and the delivery of the oil by the shipper to the carrier thereunder for transportation in foreign commerce, and even if the shipper's offense was complete in Kansas, it may have been committed in Missouri also, where its operation continued and took effect." (Italics supplied.)

The legal transportation of goods at a lawful rate through the Eastern District of Pennsylvania without intent, purpose, or agreement to commit any part of a crime did not give the District Court of the Eastern District of Pennsylvania jurisdiction to try these defendants under the Elkins Act. On this record no violation of the Elkins Act was begun, continued or brought about[5] in that District. The demurrers were properly sustained and the judgments are

Affirmed.

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[4] 153 Fed. 1, 5, 6. Cf., United States v. Lombardo, 241 U. S. 73, 77.

[5] Cf., United States v. Holte, 236 U. S. 140, 144.

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